No. 87-364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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TABLE OF AUTHORITIES

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REPLY BRIEF

We showed in our opening brief that, under Section 121 of the Natural Gas Policy Act, 15 U.S.C. 3331, statutory ceiling prices "cease to apply" to first sales of various categories of natural gas on certain dates. We also showed that Section 121 is fully consistent with Section 101(b)(5) of the NGPA, upon which respondents rely, because Section 101(b)(5) states a rule of construction which, as relevant here, compels the use of deregulated prices for the categories of gas deregulated by Section 121. As we explained, the Federal Energy Regulatory Commission (FERC) permissibly determined that if natural gas qualifies for deregulation under Section 121 and for maximum statutory prices, the gas' deregulated status always "could result in the highest price" because there are no statutory limitations on the prices for deregulated gas.

1. Nothing in the respondents' brief militates against our showing. Above all, the respondents ignore the substance of Section 121 when they argue (Brief 24) that, under Section

101(b)(5), "when a well is dually-qualified in a price-regulated and a price-deregulated category, the category which could result in the highest sale price under the terms of the sales contract for that well will apply." As indicated both in our opening brief and that of the FERC, the language of Section 101(b)(5) provides for a comparison of the maximum lawful prices which could result from the applicability of either one of the regulated pricing categories or under deregulation, rather than a comparison of the provisions of sales contracts applicable under differing regulatory conditions.

In any event, to the extent that Section 101(b)(5) standing alone might conceivably be construed in the manner urged by respondents, such a construction must fail because it would result in applying maximum ceiling prices contrary to Section 121's dictates that such prices "cease to apply." Respondents' argument is thus untenable, violating "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Telephone and Telegraph Company* v. *Santa Ana*, 472 U.S. 237, 249 (1985) quoting *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). Moreover, it is inconceivable that Congress would have provided expressly in Section 121 that statutory ceiling prices no longer apply to categories of gas and then provided by implication in Section 101(b)(5) that those prices would apply if they exceed deregulated prices under particular contracts.[1]

[1] Petitioners contend (Brief 37-38) that Section 101(b)(5) is applicable to gas qualifying both within the deregulation mandate of Section 121 and for a maximum ceiling price, as if this claim is sufficient to answer our argument that Section 121 is inconsistent with respondents' construction of Section 101(b)(5). It is not enough to prove that the rule of construction in Section 101(b)(5), through its reference to exemptions from maximum lawful prices, applies to deregulated gas as well as the various maximum lawful ceilings for regulated gas; respondents must also show that its construction of the section would be consistent with Section 121. Respondents cannot make this showing because FERC's construction of Section 101(b)(5), which makes the deregulated price applicable in such circumstances, not only is a valid construction of Section 101(b)(5) on its own terms, but the only one which is consistent with Section 121's direction that statutory ceiling prices "cease to apply."

2. Respondents claim (Brief 22) that FERC's interpretation of Section 101(b)(5) is impermissible because Section 101(b)(5) would have been drafted differently if Congress had intended to make the maximum lawful pricing provisions of the Act inapplicable to gas which had been deregulated: "Congress easily could have written a single sentence which clearly and simply provided for the price-deregulation of all gas qualifying in both regulated and deregulated categories." However, to say that Congress could have written Section 101(b)(5) in a simpler or clearer way is no help in ascertaining what Congress meant by the language it did use. Respondents' position cannot withstand scrutiny under the standard they propose, for it is respondents, and not FERC, that would have the Court, in effect, rewrite the statute and change the meaning of the words Congress used. Respondents argue that "Congress understood what it was saying" when it wrote Section 101(b)(5) stating that the "provision which could result in the highest price shall be applicable." In respondents' view, what Congress understood it was saying is "when a well is dually-qualified in a price regulated and a price-deregulated category, the category which could result in the highest sale price under the terms of the sales contract for that well will apply." But that is not what Congress actually said in Section 101(b)(5):

> Respondents have changed the congressional language "which could result in the highest price" to "which would result in the highest price under applicable contracts." If, as respondents claim, Congress understood what it was saying, the Court must give the word "could" its ordinary meaning, as FERC did, and conclude that the "provisions" of the Act removing all statutory restraints on the price for the first sales of natural gas always "could result in the highest price." *See Reiter* v. *Sonotone*, 442 U.S. 330, 338-339 (1979). Contrary to respondents' position, there is nothing whatsoever in Section 101(b)(5) that suggests Congress said "could" when it meant "would," or that Congress intended a comparison of the terms of particular contracts. In respondents' view, had Congress so intended, Congress easily could have written a single sentence which clearly and simply provided for the application of the highest price regulated or deregulated which

would result under the language of the applicable contracts.

3. The extremely selective legislative history respondents cite does not advance their efforts to avoid deregulated prices. Respondents point primarily (Brief 26-27) to the language in the Explanatory Statement of Representative Dingell concerning the role producers must play in seeking gas classifications. As indicated in our opening brief (pp. 11-12), the Explanatory Statement states that Section 101(b)(5) "is intended to facilitate resolution of which ceiling price may apply if more than one ceiling price rule appears applicable." 124 Cong. Rec. 38,363 (1978). The rule is "[w]hichever ceiling price could result in the highest price is the applicable maximum lawful price." *Id.*

Immediately following are the statements upon which respondents rely:

> of course this does not impose upon either the FERC or any state agency an affirmative obligation to identify which of several potential classifications should apply. It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him (in most cases that will be the designation which also yields the highest price).

Id. at 38,363-64. This portion of the Explanatory Statement simply is not related to the issue of whether producers can avoid the deregulation of sales of prescribed categories of gas mandated by Section 121. Instead, it indicates only that producers, and not government agencies, have the initial responsibility and related burdens of seeking the regulated classifications of their gas. The fact that in choosing in which regulated categories to seek qualification, Congress expected the producers would choose the category most favorable to them, cannot be stretched into a congressional understanding that, once the gas was deregulated, the sales contract rather than the Act itself, would determine what "provisions . . . could result in the highest price." On the contrary, immediately following the language of the Explanatory Statement cited by respondents, Representative Dingall made clear that where a producer

chooses to qualify its gas under both Section 108, and as "new gas" under Section 102, it could collect the higher 108 price "prior to January 1, 1985 [when Section 102 gas was deregulated] and deregulation of new gas thereafter."
(124 Cong. Rec. 38,363 (1978)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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